The Right to Own a Gun Is Not Guaranteed by the Constitution

Is Gun Ownership a Right?, 2010

John Paul Stevens is an associate justice of the Supreme Court. He received an AB from the University of Chicago, and a JD from Northwestern University School of Law. From 1970 until 1975, he served as a Judge of the United States Court of Appeals for the Seventh Circuit. President Ford nominated him as an Associate Justice of the Supreme Court, and he took his seat December 19, 1975.

Justice Stevens wrote a forty-six-page dissenting opinion on the District of Columbia v. Heller (2008) case that held that the Second Amendment protects an individual’s right to gun ownership. He sees “conflicting pronouncements” with almost every interpretation in the majority opinion, including the amendment’s purpose, language, history, nature of a militia, and the role of Congress. Justice Stevens writes that the majority opinion has weaknesses and often lacks accuracy in interpretation.

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it does encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in United States v. Miller, (1939), provide a clear answer to that question.

The Original Purpose of the Second Amendment

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

The Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law. Sustaining an indictment under the Act, this Court held that, “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.” The view of the Amendment we took in Miller—that it protects the right to keep and bear arms for certain military
purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.

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Since our decision in *Miller*, hundreds of judges have relied on the view of the Amendment we endorsed there; we ourselves affirmed it in 1980. No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers rejected proposals that would have broadened its coverage to include such uses....

In this dissent I shall first explain why our decision in *Miller* was faithful to the text of the Second Amendment and the purposes revealed in its drafting history. I shall then comment on the postratification history of the Amendment, which makes abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

The Language of the Amendment Is Dissected

The text of the Second Amendment is brief. It provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." ... 

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The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be "well regulated." In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence. Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies. While the need for state militias has not been a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time....

Permissible Regulations Will Be Decided in the Future

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the
meaning of rights "enshrined" in the Constitution. But the right the Court announces was not "enshrined" in the Second Amendment by the Framers; it is the product of today's law-changing decision. The majority's exegesis [analysis] has utterly failed to establish that as a matter of text or history, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "elevate[d] above all other interests" by the Second Amendment.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citizen" the right to keep and use weapons in the home for self-defense is "off the table." Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table....

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

For these reasons, I respectfully dissent.

Further Readings

Books


**Periodicals**

• Joan Biskupic and Kevin Johnson "Landmark Ruling Fires Challenges to Gun Laws," *USA Today*, June 27, 2008.


• Bob Egelko "Ruling's Ricochet, A Right to Own Guns: Supreme Court Defines 2nd Amendment—Gun Lobby Expected to Challenge S.F. Ban on Handgun Possession in Public," *San Francisco Chronicle*, June 27, 2008.


• Dave Kopel "Conservative Activists Key to DC Handgun Decision," *Human Events*, June 27, 2008.


• Lydia Saad "Before Recent Shootings, Gun-Control Support Was Fading," *Gallup, Inc.*, April 8, 2009.


• Stuart Taylor, Jr. "Recent Supreme Court Decisions Show," *Newsweek*, July 7-14, 2008.


• Nicholas Wapshott "Disney Under Fire, Battle Lines Have Been Drawn After a Disney Employee Was Sacked for Bringing a .45-Calibre Pistol to Work," *New Statesman*, July 31, 2008.


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